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No. 04-521

Supreme Court, U.S.
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In The

Supreme Court of the United States

DARRELL G. OBER,

Petitioner,

v.

RICK BROWN, SYNDI GUIDO,
BARBARA CHRISTIE, and JOANNA REYNOLDS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION

GINO J. BENEDETTI, ESQUIRE
DANIEL J. MCGRAVEY, ESQUIRE
MILLER, ALFANO & RASPANTI, P.C.
1818 Market Street, Suite 3402
Philadelphia, Pennsylvania 19103
(215) 972-6400

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether lawyers' actions in representing their clients support a subsequent lawsuit against those lawyers for alleged First Amendment retaliation.

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STATEMENT OF THE CASE

This Petition concerns two separate First Amendment retaliation lawsuits filed by Darrell G. Ober ("Ober") against the Pennsylvania State Police ("PSP") and several PSP employees. In his first lawsuit, Ober alleged that the PSP and certain officials retaliated against him for failing to disclose promptly, through his chain of command, a federal investigation into a job selling scheme perpetrated by a PSP Trooper (*Ober I*). The United States Court of Appeals for the Third Circuit concluded that Ober did not engage in protected speech, reversed the District Court's denial of Defendants' Motion to Dismiss and Ordered Ober's Complaint dismissed. *See Ober v. Evanko*, No. 02-3725, 2003 WL 22596339 (3d Cir. Oct. 21, 2003). This Court denied Ober's Petition for Writ of Certiorari. *See Ober v. Evanko*, 124 S. Ct. 2029 (2004).

In his second lawsuit (*Ober II*), which is the subject of this Petition, Ober sued the PSP attorneys and their investigator from *Ober I*, alleging retaliation. This "retaliation" included purportedly filing false or misleading pleadings, suborning perjury and preparing false or misleading affidavits during the *Ober I* litigation. Each act of alleged retaliation by the attorneys in *Ober II* is alleged to have occurred during or would have been known by Ober in the first case. Yet, Ober failed in *Ober I* to seek sanctions against the attorneys for this alleged misconduct.

SUMMARY OF ARGUMENT

Petitioner fails to offer the required compelling reason to justify review of his petition for a writ of certiorari. He

cites no conflict among state or federal courts and does not identify the type of important question that should be settled by this Court. Instead, the Petitioner asks for this Court's intervention based exclusively on a purported error of fact or a misapplication of the properly stated law. These grounds rarely support a petition for writ of certiorari. Sup. Ct. R. 10.

Further, the courts below made no erroneous factual findings or misapplication of law. Indeed, lawyers' actions in the course of defending their clients in a lawsuit cannot form the basis for a subsequent First Amendment retaliation lawsuit. The remedy for such alleged misconduct, if any, is court-imposed sanctions. Where such sanctions are neither requested by Petitioner nor imposed by the Court, the Petitioner cannot create a second opportunity to allege misconduct by filing a subsequent First Amendment lawsuit claiming retaliation.

REASONS FOR DENYING REVIEW

I. OBER FAILED TO SATISFY HIS STRINGENT BURDEN TO JUSTIFY THIS COURT'S GRANTING OF HIS PETITION

Petitioner relies on the lower courts' alleged "misunderstanding of the facts" and "failure to accurately portray the misconduct of Respondents" to establish compelling reasons for this Court to grant his petition for writ of certiorari. *See* Petition at 4,5,6. These grounds rarely support the granting of a petition for writ of certiorari. Sup. Ct. R. 10. This case is not one of those rare circumstances. Here, Petitioner merely disagrees with the lower

courts' findings without offering any legal basis to support this Court's review of those findings.

Further, the Petitioner concedes that no conflict exists among or between the district courts, courts of appeal and state courts of last resort regarding whether his First Amendment retaliation claim is actionable.[1] Accordingly, Petitioner fails to offer any compelling reason to justify this Court's intervention.

II. THE THIRD CIRCUIT CORRECTLY APPLIED THE LAW THAT LAWYERS' ACTIONS IN REPRESENTING THEIR CLIENTS DO NOT SUPPORT A SUBSEQUENT FIRST AMENDMENT RETALIATION LAWSUIT AGAINST THOSE LAWYERS

Even accepting as true Petitioner's allegations of misconduct, the law does not recognize a First Amendment retaliation claim. *See Heffernan v. Hunter*, 189 F.3d 405, 412 (3d Cir. 1999) (holding that even though an attorney's challenged activity, taken within the scope of representation, may violate the canons of ethics, does not mean that the conduct is actionable in damages or for injunctive relief – the offended party has a remedy through court-imposed sanctions or reference to state disciplinary bodies);

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[1] Indeed, the authorities cited by Petitioner do not even address that issue. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (antitrust violation alleged); *Brown v. Grabowski*, 922 F.2d 1097 (3d Cir. 1990) (woman's due process right of access to courts for state's failure to advise her of right to restraining order); *Anderson v. Davila*, 125 F.3d 148 (3d Cir. 1997) (need to vacate permanent injunction due to lack of notice); *Bradley v. Pittsburgh Board of Education*, 910 F.2d 1172 (3d Cir. 1990) (regulation of teacher's in-class conduct does not violate the First Amendment).

Maritrans GP v. Pepper, Hamilton and Scheetz, 529 Pa. 241 (1992) (same); *Farese v. Scherer*, 342 F.2d 1223, 1232 (11th Cir. 2003) (attorney's conduct within scope of representing client will not subject him to liability); *Taco Bell Corp. v. Cracken*, 939 F. Supp. 528, 533 (N.D. Tex. 1996) (no action exists against an attorney whose conduct was part of the discharge of his duties in representing his client); *Gittens v. Sullivan*, 670 F. Supp. 119, 125 (S.D.N.Y. 1987) (same); *White v. Bayless*, 32 S.W. 3d 271, 276 (Tex. App. 2000) (even when attorney engages in wrongful conduct as part of the discharge of his duties there is no cause of action to the party on the other side).

Because all of the alleged misconduct in *Ober II* was known by Ober or occurred during *Ober I*, Petitioner's only remedy was to seek court-imposed sanctions as part of the first case. Specifically, Petitioner should have sought relief under either Fed. R. Civ. P. 11, 26, 37, 56(f) or 28 U.S.C. § 1927. Alternatively, Petitioner could have petitioned the district court to exercise its inherent power to sanction an attorney's alleged bad-faith conduct. *See Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (when there is bad faith conduct in the course of litigation, courts have inherent power to sanction attorneys for conduct not otherwise covered by Fed. R. Civ. P. 11 or 28 U.S.C. § 1927); *Gillette v. Bayernwald-Fruchteverwertung*, 977 F.2d 809, 813 (3d Cir. 1992) (holding that court can exercise inherent power to sanction when other rules are insufficient).[2] Under no circumstances, however, does the law recognize a First

[2] Petitioner was aware of this remedy as he allegedly requested sanctions from the *Ober I* trial court. *See* Petition at 2. Nevertheless, the district court's refusal to award sanctions does not justify a subsequent First Amendment retaliation lawsuit.

Amendment retaliation claim for alleged misconduct by attorneys.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

MILLER, ALFANO & RASPANTI, P.C.

GINO J. BENEDETTI, ESQUIRE
DANIEL J. MCGRAVEY, ESQUIRE
1818 Market Street, Suite 3402
Philadelphia, Pennsylvania 19103
(215) 972-6400

Attorneys for Respondents

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